Supreme Court, U.S.
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No. 94- ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH MICHAEL ALF, et al.

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

Petition for Writ of Certiorari to the
District Court of Appeal of the State of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), this Court declined to rule on an overbreadth challenge to that portion of an injunction in that case making it applicable to those "acting in concert" with the named parties. *Id.* at 2530. This Court did so because the *Madsen* petitioners, who were parties to the injunction, lacked standing to raise the issue. *Ibid.*

Here, a Florida trial court convicted the petitioners of indirect criminal contempt for violating the *Madsen* injunction despite undisputed evidence at trial that none of the petitioners was a named party to the injunction and none of the petitioners was an officer, agent, servant or employee of any of the individuals or organizations named in the injunction. Moreover, as to nearly all of the 108 petitioners, the arresting officers testified at trial that they had no knowledge that those individuals were acting on behalf of or in concert with any of the parties to the injunction. In the view of the petitioners, the following questions are presented:

1. Does the enforcement of an injunction against petitioners, who are neither parties to the injunction nor officers, agents, servants, or employees of parties, nor acting in concert with named parties, violate their rights to due process?

2. Does the enforcement of an injunction against petitioners, whose only proven relationship to parties named in the injunction is a common viewpoint regarding abortion, unconstitutionally abridge their rights of free speech, assembly and association?

PARTIES

The following persons were appellants in the proceedings below:

Case No. 94-190

Joseph Michael Alf, Cherry Andersen, David Kent Andersen, Milton Franklin Arthur, Gail Landis Brightbill, Valerie Cadle, Ann A. Cooper, Richard Joseph Dean, Thomas Patrick Edens, Mark Steven Hall, Jeffrey Theodore Harris, John Anthony Kelley, James F. Kiernan, Peter Knudsen, Robert Kopitzke, Thomas Edward Kryst, Luther Vincent Laite, Dorothy Phyllis Leeds, Charles John Linderberger, Don Lord, James E. Maher, Patricia McEwen, Thomas Francis McGlade, Patricia Morris, Norma P. Munroe, Gerald Martin Nichols, Eric Daniel Olson, Rory Michael Pastorius, Joel Patrick Pinkston, Meredith Trotter Raney, Brijet Salberg, Sally Salberg, Leslie Leon Shrock, Donald Lee Sniff, Mary Sutphin, Cheryl Unterberger, Raymond Charles Unterberger, Char W. Zody.

Case No. 94-191

Shirley A. Alspaugh, Anita Lorezoni Carroll, James Bowler Carroll, Joseph Patrick Carroll, Robert Chapman, Michelle Cramer, Gordon L. Deans, Sheila Rae Eschenberg, Rebecca Hawkins, Kathleen Herbert, Bonni Jo Jeffries, Arlean B. Kelley, Bruce Adrian Labadie, Kenneth Bart Lacy, William Lestourgeon, Donald R. Long, James R. Maclean, Patrick McDaniel, Jamie Patrick Murphy, James Russell Myers, Eric Daniel Olson, Cheryl Palmer, Carlos Quintero, Ariel Joan Robinson, John Christopher Rogers, Rudy Peter Rohlke, Lawrence Wayne Salberg, Greg P. Segallis, William B.

Strittmater, Nancy Struna, Terrence J. Struna, Phillip Allan Sutphin, Keith Tucci, James Henry Tulley, M. Patricia Vanderbilt, Richard Vanderbilt, Rachel Lorrene Velie, James A. Voor, Arthur Pride Wimer.

Case No. 94-192

Daniel Murphy Dupuy, Dolly Edwards, Teki Collette Hawkins, Allan Ray Munroe, Marjorie Quintero, Betty Jean Rose, Janet R. Voor, Elaine Rae Olson, Cheryl Unterberger, Terry Warren Chapman, Christine Brown Jagos, Mary Barker Lestourgeon, Robin L. Long, Patricia McEwen, Andrea Dawn Selph, Joyce Parenteau Wade, Wendy Ruth Wright, Katherine Andrews Kozlowski, Keith Alan Brightbill, Helen Margaret Huntoon, Linda Lorraine Lightner, Edward F. Lines, Linda Karin McGlade, Gertrude Balke McGrede, Eric Daniel Olson, Thomas Ellis Plunkett, Meredith Trotter Raney, Patricia Gore Rodgers, Debora Lynn Schmidt, Lisa Diane Shrock, Raymond Charles Unterberger.

None of the petitioners in this case is a corporation. *See* Rule 29.1

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The decisions of the District Court of Appeals of the State of Florida, Fifth District, are not reported. App. A, B, & C, 1a-6a. The trial court's findings of fact and conclusions of law were made orally at the conclusion of each trial. See Tr. 360-362 (July 13, 1993, Trial); Tr. 353-355 (July 13, 1993, Trial); Tr. 786-788 (July 9, 1993, Trial.) The trial court's written "Judgment Finding Contempt" for each case appears in the Appendix hereto. App. D, E, F, 7a-19a.

JURISDICTION

The District Court of Appeal of the State of Florida, Fifth District, entered its decision on Case No. 94-190 on March 7, 1995, in case No. 94-191 on March 14, 1995; and in case No.

94-192 on February 28, 1995. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

These cases arise out of the picketing of a Melbourne, Florida abortion business by persons opposed to abortion.[1] Petitioners are 108 persons convicted by a Brevard County, Florida trial court of Indirect Criminal Contempt for violating the same injunction which this Court upheld in part and vacated in part in *Madsen v. Women's Health Center, Inc.*, 114 U.S. 2516 (1994). The trial court found that each petitioner entered the 36-foot buffer zone protecting the entrances to the facility in violation of the Amended Permanent Injunction issued by Judge McGregor on April 8, 1993.[2]

The series of arrests at issue herein took place over the course of the following dates: April 10, 1993, April 17, 1993, April 24, 1993, April 28, 1993, May 8, 1993, May 22, 1993, and June 5, 1993. Each of the petitioners was charged with the offense of Indirect Criminal Contempt. The cases were consolidated for trial and heard in three separate trials on the following days under the following titles: *State v. Alspaugh, et*

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1. The history and factual background of pro-life demonstrations of the facility in question is well known to this Court from the case of *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). Other judicial opinions which contain discussions of picketing and similar activities at the same facility leading to the issuance of the injunction involved in this case include *Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664 (Fla. 1993); and *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993), *vacated on reh'g and remanded*, 41 F.3d 1421, 1422 (11th Cir. 1994) (en banc).

2. The circumstances leading to the issuance of the injunction by Judge McGregor are set forth at length in *Madsen*, 114 U.S. at 2521-2522. The 36-foot buffer zone was, of course, one of the contested provisions of the injunction upheld by this Court in *Madsen*. *Id.* at 2521.

al., July 6 - July 9, 1993 (Case No. 94-191 in the District Court of Appeals); *State v. Alf, et al.*, July 12 - July 13, 1993 (Case No. 94-190); and *State v. Dupuy, et al.*, July 13 - July 15, 1993 (Case No. 94-192) App. D, E & F, 7a-19a.

By its terms, Judge McGregor's order was binding on the following individuals and groups: "Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees, and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them, or on their behalf . . . ." *See, Madsen v. Women's Health Center, Inc.*, 114 U.S. at 2521, n.1. The first hint of the all but unlimited scope of Judge McGregor's order, at least as it was understood by the courts below is contained in the transcript of the Appearance Hearing before Judge McGregor which took place on April 12, 1993. There, in response to questions raised by the defendants on the "acting in concert" issue, Judge McGregor stated that the police on the scene of the demonstration determined "in their minds whether what you were doing was in concert with the – I gather the pro-life position of the other, of the named defendants." Tr. 148 (Apr. 12, 1993, Appearance Hearing).

In fact, the series of statements about the scope of the injunction made by Judge McGregor at this hearing was cited by the dissent in *Madsen*, 114 U.S. at 2540 as proof that the injunction "is tailored to restrain persons distinguished, not by proscribable *conduct*, but by proscribable *views*" (emphasis in original).

It was against this backdrop that the trials of these matters began in July, 1993. At a hearing in chambers on the

first day of the first of the series of trials, counsel for the State of Florida and the defendants outlined their positions on a number of the legal issues in the case. *See* Tr. 1-70 (July 6, 1993, Hearing).[3] Defense counsel[4] asserted the position that mere knowledge of the terms of the injunction and the doing of something forbidden by its terms was not sufficient legal basis for a finding of contempt against a non-party. *See* Tr. 36, 38, 51-56, 58-65 (July 6, 1993, Hearing).

In response, the State's attorneys took the position that "*anyone who enters that buffer zone*, . . . has, at the very least, a tacit agreement to aid and abet and interfere with the legitimate order of the Court." *See* Tr. 60: 14-18 (July 6, 1993, Hearing) (emphasis added). The State contended that it need not prove a conspiracy to violate the injunction between a party and a non-party, "merely an act in concert with; that is, *kindred spirit type action* which the person acts in violation and knowing willful violation and interference of a legitimate Court Order." *See* Tr. 61: 16-21 (July 6, 1993, Hearing) (emphasis added). Finally, one of the State's attorneys apparently took the position that the concerted action which must be proven could be simply concerted action among the non-parties themselves without regard to the named parties. *See* Tr. 62: 8-20 (July 6, 1993, Hearing).

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3. In addition to the "acting in concert" issue, petitioners raised numerous other issues in the courts below. The present petition is limited to the due process and First Amendment ramifications of the Florida courts' handling of the "acting in concert" issue.

4. All of the petitioners were represented in the trial court by George T. Paulk, Esq.

At the first of the consolidated trials, the State attempted to prove concerted action through the testimony of Melbourne police captain, Gary Allgeyer, who had overall responsibility for responding to problems arising with protests at the abortion facility in question. Despite the State's attempt to draw a connection between one of the defendants, Keith Tucci, and one of the named parties to the injunction, Bruce Cadle, Captain Allgeyer candidly conceded that *he had no evidence that any of the defendants arrested on the date in question*[5] *acted in concert or participation with any of the organizations or individuals named in the injunction.* *See* Tr. 158: 16 to 159:6 (July 7, 1993, Trial). Moreover, the arresting officers of 30 of the defendants testified that they had no reason to believe that the defendants they arrested were acting in concert or participation with any party named in the injunction. *See* Tr. 179, 226, 261, 306, 319, 348, 363 (July 7, 1993, Trial). The arresting officers of 4 of the defendants testified that they did not know if the defendants they arrested were acting in concert with a named party. *See* Tr. 215-216 (July 7, 1993, Trial). Finally, the arresting officers of 4 other defendants gave no better than ambiguous responses to the question regarding action in concert by the defendants by arrested. *See* Tr. 194-196, 278-279 (July 7, 1993, Trial).[6]

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5. The names of these defendants are set forth at page ii-iii, , above, under "Case No. 94-191."

6. For example, when asked if he had any knowledge that defendant Rohlke was acting in concert with any named party to the injunction, Office Laderwag replied: "I didn't say he was a member of Operation Rescue. I said he's operating by my definition of `in concert with' meaning in accordance with their goals and procedures and actions." *See* Tr. 195 (July 7, 1993, Trial). When asked whether he knew of "any agreed upon plan between Mr. Rohlke and these people" [named parties

At the trial of the second group of consolidated cases, *State v. Alf, et al.*, Case No. 94-190, the arresting officers of 33 of the 38 defendants testified that they had no knowledge of any facts indicating that the defendants they arrested were acting in concert with any party named in the injunction. *See* Tr. 31-32, 38, 44-45, 48, 62-63, 72-73 (July 9, 1993, Trial); *see also* Tr. 105, 128-129, 178, 257, 304, 305 (July 12, 1993, Trial). The arresting officer of defendants Morris and Brightbill said that they approached the buffer zone after speaking with an "organizer." The alleged "organizer," however, was not identified either by name or by connection to any of the named parties. *See* Tr. 133-134 (July 9, 1993, Trial). Finally, the officer who arrested defendants Olson and Maher testified simply that he had seen them standing "with the group across the street." The officer did not identify the group and made no claim that this "group" was composed, of or acting in concert with, any named parties to the injunction. *See* Tr. 147 (July 9, 1993, Trial).

The third of the consolidated trials, *State v. Dupuy, et al.*, Case No. 94-192, proceeded along similar lines. This trial involved arrests made over several dates. During this trial however, the State attempted to show concert of action by testimony that some of the defendants arrested for violating the injunction had attended a series of anti-abortion rallies or meetings described as "impact training" in the months of January through early April, 1993. *See* Tr. 246-281 (July 14, 1993, Trial). The State's main witness for this aspect of the case conceded, however, that these "impact training" sessions were "basically a church service." *See* Tr. 284 (July 14, 1993, Trial). The same witness admitted that the purpose of these sessions

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to the injunction], the officer answered: "No, I don't." *See* Tr. 196: 1-8 (July 7, 1993, Trial).

was to train future pro-life leaders from other parts of the country who were then to go home and become leaders in their own communities. *See* Tr. 283: 23 to 284: 3 (July 14, 1993, Trial). Furthermore, during the entire period of "impact training" sessions, from January to early April 1993, there were no arrests for violations of Judge McGregor's original injunction or other unlawful conduct. *See* Tr. 285: 4-23 (July 14, 1993, Trial). Finally, with regard to Bruce Cadle, the only named party identified as participating in some of the "impact training" sessions and later being spotted near the abortion facility on one or more dates when arrests took place, the same witness admitted that he "never heard Bruce Cadle encourage anyone to cross the street and violate the injunction." *See* Tr. 286: 13-18 (July 14, 1993, Trial).[7]

In his closing arguments in each of the three consolidated trials, defense counsel argued, among other things, that the State had failed utterly to prove action in concert between his clients and any named parties to the injunction. *See* Tr. 749-765 (July 9, 1993, Trial); Tr. 320-336 (July 13, 1993, Trial); Tr. 337-349 (July 15, 1993, Trial). Counsel pointed out that none of the named parties to the injunction were arrested on any of the arrest dates and that testimony about the mere presence on the scene of one named party on one occasion did not show any concert of action. *See* Tr. 345 (July 15, 1993, Trial). Moreover, the candid testimony of the arresting officers of nearly every defendant argued overwhelmingly in favor of

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7. One of the more curious arguments made by the State below is that attendance at "church rallies" in January, February, or March of 1993 is evidence that a particular attendee conspired with named parties (who also may have attended one or more of the rallies) to violate certain provisions of an injunction which did not even exist until April 8, 1993.

acquittal.

The State's attorney argued that "there's no legal definition of what has to be used to define active concert or participation .... You're not restricted to any of the language that Mr. Paulk would like the Court to be restricted to because this isn't a legal term." *See* Tr. 774: 18-24 (July 15, 1993, Trial).[8] The State argued further that the requisite concert of action could be proven by showing that the defendants acted in concert *with each other* rather than with a named party. *See* Tr. 776: 1-8 (July 15, 1993, Trial); *see also* Tr. 339: 10 to 340: 6 (July 13, 1993, Trial). The State contended that there was proof of a coordination of efforts between Mr. Tucci's group (not a name party) and Mr. Cadle's group (a named party not arrested on any of the dates in question). This proof consisted of the fact that "they all have the same apparent motives and, that is, as many of them testified, they don't like abortion." *See* Tr. 779: 1-7 (July 15, 1993, Trial).

Each of the petitioners herein was convicted by the trial court of the offense of Indirect Criminal Contempt. *See* App. D, E & F, 7a-19a. The trial court's oral findings of fact and conclusions of law in each case consist essentially of a bare recitation of the elements of the offense and a statement that each of the defendants is guilty of the offense. *See* Tr. 360-362 (July 13, 1993, Trial); Tr. 353-355 (July 15, 1993, Trial); Tr. 786-788 (July 9, 1993, Trial). In the *State v. Alf, et al.* matter, Case

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8. In response to this extraordinary misstatement of the law, Mr. Paulk immediately pointed out that the term in question appears verbatim in Rule 1.610 of Florida's Rules of Civil Procedure. *See* Tr. 775 (July 15, 1993, Trial). The same term appears, of course, in Fed. R. Civ. P. 65(d).

No. 94-191, the trial court did say that he was convinced that "Mr. Cadle [not a defendant in this case] and his organization and Mr. Tucci and his organization [not named parties to the injunction] are hand in glove so to speak." *See* Tr. 361: 15-20 (July 13, 1993, Trial). The court then made the following observation: "There's been some evidence that these organizations do not have membership lists. I will imagine, however, they have a long mailing list of contributors and other active participants." *See* Tr. 361: 21-25 (July 13, 1993, Trial). These two quotations constitute the totality of the trial court's findings of fact on the "acting in concert" issue of all three consolidated cases.

All but 11 of the 108 petitioners received identical sentences of 6 months probation, payment of costs and a monetary fine of $200. Of the 11 remaining petitioners, who were adjudged guilty of violating the injunction on more than one of the dates in question, 6 received 6 month jail sentences (5 months of which was stayed by the court on certain conditions); the remaining 5 petitioners were placed on 6 months supervised probation and required to pay costs and fines. *See* App. D, E & F, 7a-19a.

Petitioners appealed their convictions to the Florida District Court of Appeals, Fifth District. That court rendered its decision in Case No. 94-192 on February 28, 1995; in Case No. 94-190 on March 7, 1995; and in Case No. 94-191 on March 14, 1995. The Court of Appeal's decisions in each of the three cases are identical and may be quoted in their entirety as follows: "Affirmed." *See* App. A, B & C, 1a-6a.

REASONS FOR GRANTING THE WRIT

What this Court characterized in *Madsen* as "an abstract controversy" over the use of words has become a concrete reality for the petitioners in this case. *Madsen*, 114 U.S. at 2530. The courts below have taken the extraordinary step of enforcing a judicial order of limited scope against an entire class of people whose only proven connection with each other is a common viewpoint on abortion. What was supposed by this Court and the Florida Supreme Court to be a precisely drawn regulation of the rights an obligations of specific parties in a specific context has become a dragnet to haul in for punishment all those who, like the named parties in the injunction, "don't like abortion." *See* Tr. 779: 1-7 (July 15, 1993, Trial). The decision below strikes at the heart of the Bill of Rights, sweeping away in one fell swoop petitioners' rights to due process, free speech assembly, association and petition.

Over the past two decades both State and Federal courts have grappled with attempts by owners of abortion businesses to restrict the expression of anti-abortion speech near their premises.[9] This line of cases reached a culmination of sorts in this Court's decision in *Madsen v. Women's Health Center, Inc.*, 114 U. S. 2516 (1994). But *Madsen* left expressly unresolved the extent to which an injunctive order in this setting may be applied to persons who are not named parties in the injunction.

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9. *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989); *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990); *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989); *Planned Parenthood League of Massachusetts v. Operation Rescue*, 406 Mass. 701, 550 N.E.2d 1361 (1990); *O.B.G.Y.N. Ass'n v. Birthright of Brooklyn and Queens, Inc.*, 64 A.D.2d 894, 407 N.Y.S.2d 903 (1978).

The attempt by the *Madsen* petitioners to raise that issue was rejected by this Court on the grounds that the *Madsen* petitioners, as parties in the injunction, lacked standing to raise it. *Madsen*, 114 U.S. at 2530. That issue now presents itself squarely in the persons of these petitioners who, although not named as parties in the injunction and not shown to have acted in concert with any named parties, were nevertheless tried and convicted of violating the terms of the injunction.

This cases raises issues of national import. The First Amendment ramifications of holding people bound by the terms of an injunction directed against others primarily if not solely on the basis of a shared viewpoint are obvious. Yet, as noted by the dissent in *Madsen*, 114 U.S. at 2540, the construction given this injunction by the issuing judge would permit just such an application, *i.e.*, a restraint applied to "persons distinguished, not by proscribable *conduct*, but by proscribable *views*." *Ibid.*

The fears of the dissenting Justices in *Madsen* have been realized in this case. The result bodes ill indeed for anyone interested in the continued viability of First Amendment rights.[10]

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10. At oral argument before this Court in *Madsen*, counsel for the respondents represented to this Court that ". . . is someone shows up who is not associated with them [named parties], but is a prolife speaker, they're not subject to the injunction . . ." One member of this Court responded to this by observing: "They take their chance at being considered in concert . . . ever heard of a chilling effect." Counsel conceded that "there's a possibility of some chilling effect." *See* App. G, 20a-22a.

Somewhat less obvious but no less important is the due process issue in this case. At least since Magna Carta it has been axiomatic that a court may not punish a person without a hearing. The flaw underlying the Florida court's application of this injunction, however, is that is punishes those who never had the opportunity to have *their* rights adjudicated nor to contest through the appellate process the validity of the injunction either on its face or as applied to them. The injunction in this case, as enforced by the issuing judge, acts more like a statute of local effect than a precise regulation tailored to remedy specific harm done or threatened to be done by specific parties. Mere knowledge of the existence of the injunction coupled with the doing of a prohibited act suffices to convict a person. Concerted action is presumed upon a showing of similar beliefs. *See Madsen*, 114 U.S. at 2540.

Because this Court's decision in *Madsen* will be viewed as authoritative in establishing the parameters within which lower courts must confine themselves in issuing injunctive orders in similar settings, it is essential that this Court now address the issue of the scope of injunctions in this context. The chilling effect on First Amendment rights and the specter of wholesale denial of due process are no longer hovering mirages in the distance, but concrete, and shocking realities; these realities are no longer across some faraway bridge, but directly presented in this Petition. In this case this Court has come to the bridge and must cross it.

I. THE DECISION BELOW CONFLICT DIRECTLY WITH THE DECISIONS OF THIS COURT AND OTHER FEDERAL AND STATE COURTS

A. The Scope of Injunctions

For at least the past sixty years this Court has consistently held that the scope of an injunction may not extend to persons who merely acquire notice of it but are neither parties nor legally identified with parties. *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9 (1945); *Chase National Bank v. City of Norwalk*, 291 U.S. 431 (1934). In *Regal Knitwear*, this Court recognized the fundamental due process underpinnings of this limitation of power, stating that: "[T]he courts, nevertheless, may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudicated according to law." 324 U.S. at 13.[11]

The classic exposition of the law in this area is, of course, Judge Learned Hand's opinion in the case of *Alemite Mfg. Co., v. Staff*, 42 F.2d 832 (2d Cir. 1930). *Alemite* was a patent infringement suit in which the plaintiff sued the owner of a business and his salesman for infringement of a patent. The suit was dismissed as to the salesman and an injunction was entered against the business, its agents, servants, employees, associates and confederates, enjoining infringement. The salesman later left the business's employ, set up shop for himself and began to infringe the patent. Plaintiff bought a contempt proceeding in the original suit against the salesman alleging that he was bound by the injunction as an agent, servant, etc. The salesman was found guilty of contempt in the District Court and appealed. *Id.* at 832.

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11. Regarding the due process problems presented by injunctions applied to nonparties, *see*, Note, *Contempt by Strangers to a Federal Court Decree*, 43 Va. L. Rev. 1294, 1297 (1957); *see also*, Dobbs, *Contempt of Court: A Survey*, 56 Cornell L. Rev. 183, 250 (1971); Gregory, *Government by Injunction*, 11 Harv. L. Rev. 487, 501-02 (1898).

In reversing the salesman's conviction, Judge Hand wrote:

> . . . no court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If is assumes to do so, the decree is pro tanto brutum fulmen,[12] and the persons enjoined are free to ignore it. *Ibid.*

The crucial distinction between legislative and judicial powers which makes necessary the limitations on the scope of injunctions was stressed by Hand:

> It [the court] is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court. Thus the only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has the power to forbid, an act of a party. *Id.* at 832-833.

In the context of the petitioners' cases, the following language from *Alemite* is particularly on point to demonstrate the defect in the decisions below:

> Thus, if the defendant is not involved in the contempt, the employee cannot be; the decree has not been

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12. So much empty noise.

> disobeyed . . . *for it is not the act described which the decree may forbid, but only the act when the defendant does it.* *Id.* at 833 (emphasis supplied).

The holdings and rationale of *Chase*, *Regal Knitwear* and *Alemite* have stood unchallenged for the past half-century.[13] *See* 11 C. Wright & A. Miller, Federal Practice and Procedure § 2956 (1973); Moore's Federal Practice ¶ 65.13 (2d ed., 1980 rev.); *see also* Note, *Developments in the Law – Injunctions*, 78 Harv. L. Rev. 994, 1029 (1965). The limiting doctrine itself is embodied in Fed. R. Civ. P. 65(d).[14]

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13. The State's reliance in the trial below on the case of *U.S. v. Hall*, 472 F.2d 261 (5th Cir. 1972) was misplaced. *Hall* involved desegregation efforts in the Duvall County, Florida schools. Local officials petitioned the U.S. District Court for injunctive relief alleging that Eric Hall and other "outsiders" were engaged in deliberate attempts to interfere with the desegregation of the schools. Although Hall was not specifically named in the court's decree (and asserted this as a defense to his contempt prosecution) he was one of the parties specifically named in the petition requesting injunctive relief. The factual distinction between Hall's situation and that of the petitioners in this case is obvious. Moreover, the *Hall* opinion has been sharply criticized by commentators as irreconcilable with the *Regal Knitwear*, *Alemite* doctrines. *See*, Note, *Injunctions: Can They Bind Parties Not Mentioned in Rule 65(d)?* 35 U Pitts. L. Rev. 483 (1973); *see also*, Note, *Injunctions*, 26 Vand. L. Rev. 625 (1973).

14. State courts have universally acknowledged the doctrine either by express reference to the governing case law or to the federal rules or analogous state rules. *See, e.g.*, *Stavros v. Karkomi*, 28 Ill. App. 3d 996, 329 N.E.2d 563(Ill. Ct. App. 1975); *Estate of Rothko*, 84 Misc. 2d 830, 379 N.Y.S.d 923 (Surr. Ct. 1975); *Jacquin v. Pennick*, 68 Pa Cmwlth 327, 449 A.2d 769 (Pa. Commw. Ct. 1982); *Berger v. Superior Court*, 167 P. 143 (Ca. 1917); *Rigas v. Livingston*, 178 N.Y. 20, 70 N.E. 107 (NY 1904);

Here, the trial court was urged to, and apparently did, accept the idea that circumstantial evidence of association between some of the petitioners and one of the named parties in pre-injunction activity[15] was sufficient to prove beyond a reasonable doubt action in concert between a named party (never identified by the court below in its oral or written findings) and *all* of the petitioners in post-injunction activity.

The decisions below demonstrate a total lack of awareness of the well-established limitations imposed on courts when issuing injunctions. Indeed, to the extent that the trial court made any findings of fact on the acting in concert" issue, he appears to have magnified his own suspicions, conjectures and surmises about the relationship of one petitioner (Tucci) and one named party (Cadle) into proof beyond a reasonable

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Alger v. Peters, 88 So.2d 903 (Fla. 1956).

15. The Second Circuit has addressed the issue of what proofs are necessary to establish concert of action in the case of *G & C Merriam Co. v. Webster Dictionary Co., Inc.* 639 F.2d 29 (2d Cir. 1980). The case involved a trademark dispute between two publishing companies. Citing both *Alemite* and *Regal Knitwear* for support, the Second Circuit said:

> Proof of a relationship to the pre-injunction act of a party may be circumstantially suggestive, but a nonparty, if not legally identified with a party, can be found to be in contempt *only if an active concert or participation with a party in postinjunction activity.*

G & C Merriam Co., 639 F.2d at 35 (emphasis supplied).

doubt of concerted action by all the petitioners.[16]

The decisions below ignored all applicable precedents of this Court, and other Federal and State courts including Florida. The convictions of these petitioners represent such a flagrant and egregious departure from settled law that they merit nothing less than summary reversal.

B. The Abridgment of Petitioners' Freedom of Speech, Assembly, and Association.

Under the Florida Court's construction of this injunction, a person from Maine, of prolife views, wearing say, a shirt bearing the slogan "Choose Life" could be arrested while vacationing in Florida if she happened to linger too long (in the opinion of the local gendarmerie) on a certain public sidewalk in Melbourne. This would be so even if the vacationer had never heard of Operation Rescue, Bruce Cadle, Judy Madsen, or

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16. Ironically, it was the Supreme Court of Florida, in the case of *Alger v. Peters*, 88 So. 2d at 906, which wrote one of the strongest judicial expressions of the evil attendant upon such unwarranted extension of an injunction's scope:

> It is so fundamental to our concept of justice that a citation of supporting authorities is unnecessary to hold that the rights of an individual cannot be adjudicated in a judicial proceeding to which he has not been made a party and from which he has literally been excluded by the failure of the moving party to bring him properly into court. Under our system a man's rights cannot be disposed of or otherwise determined by a judicial decree entered in absentia.

Ibid.

Randall Terry. Only let her admit or have someone testify that she had once been seen in a church service at the same time as one of the aforementioned unworthies and the hapless vacationer has probably earned herself an extension of her Florida sojourn – a 30 day stay in the Brevard County jail.

This Court has never countenanced the notion that a person may be found guilty of a criminal offense based solely on his beliefs. On the contrary, this Court has consistently held that: "[T]he First Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his association with another." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, at 918-919 (1981).

In *Healy v. James*, 408 U.S. 169 (1972), this Court noted that it has "consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." *Id.* at 185-186. And, this Court said, "it has been established that `guilt by association along, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights." *Id.* at 186 (quoting *United States v. Robel*, 389 U.S. 258, 265 (1967)).

In *Claiborne Hardware*, this Court rejected a claim that the NAACP and individual petitioners could be held liable for damages assessed in connection with a massive boycott of white merchants. Liability against numerous petitioners was premised upon their attendance at weekly meetings of the NAACP at which, among other things, enforcement of the boycott by means of threats and intimidation was discussed. As this Court noted: "the chancellor in this case made no finding that the

individuals who committed those acts of violence were 'agents' or 'servants' of those who attended the NAACP meetings; *certainly such a relationship cannot be found simply because both shared certain goals. NAACP v. Claiborne Hardware*, 458 U.S. at 925 n.69 (emphasis supplied).

In the present cases, the record below is clear that the judge who issued the injunction deemed the mere attempt to express a certain viewpoint sufficient to satisfy the "acting in concert" requirement of his injunction. *See* Tr. 104-105 (Apr. 12, 1993, Appearance Hearing) (quoted in *Madsen*, 114 U.S. at 2540). The State's attorney at trial contended that concerted action or participation with named parties was shown by the fact "that all share the same apparent motives . . . they don't like abortion." *See* Tr. 779: 1-7 (July 15, 1993, Trial). And, finally, the trial judge, to the extent he made any findings of fact, seems to have been especially persuaded of the petitioners' guilt by his "finding" that the petitioners *may be* on the mailing lists of certain unidentified organizations (presumably named parties in the injunction). *See* Tr. 361: 21-25 (July 13, 1993, Trial).

To allow these convictions to stand would be to gut the First Amendment and trash the last hundred years of this Court's constitutional jurisprudence. These petitioners were subjected to criminal convictions and some are facing jail sentences in a case where an essential element of the offense charged, "acting in concert," was deemed satisfied by a showing that they "don't like abortion" or because the trial judge "imagined" that their names may appear on some unidentified organization's mailing list. And this despite the extraordinary candid testimony from the arresting police officers, as to almost every single petitioner, that the *officer had no knowledge that the*

defendant was acting in concert or participation with any named party in the injunction.

II. THE DECISIONS BELOW SHOULD BE SUMMARILY REVERSED OR VACATED

The decisions of the Florida District Court of Appeals, Fifth District, affirming the trial court's decisions in these cases are so plainly and obviously wrong in the context of this Court's prior decisions that summary reversal of petitioners' convictions is warranted. Hence, this Court should grant the petition and summarily reverse. In the alternative, the Court should grant the petition, vacate the decisions below, and remand for further consideration in light of this Court's well established precedents.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and either summarily reverse or vacate and remand for further consideration. In the alternative, this Court should grant this petition and set the case for plenary review.

Respectfully submitted,

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Washington, DC 20007
(202) 337-2273

Attorneys for Petitioners

May 30, 1995.

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FIFTH DISTRICT
JANUARY TERM 1995

JOSEPH MICHAEL ALF, et al.

Appellants,

v. CASE NO. 94-190

STATE OF FLORIDA,

Appellee.

Decision filed March 7, 1995

Appeal from the Circuit Court
for Brevard County,
John A. Rudd, Senior Judge.

John W. Tanner, P.A., and
Judy Taylor Rush, of
Tanner & Wilson
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Kellie A. Nielan,
Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM

AFFIRMED.

HARRIS, C.J., DAUKSCH and PETERSON, JJ., concur.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA FIFTH DISTRICT
JANUARY TERM 1995

SHIRLEY A. ALSPAUGH, et al.

Appellants,

v. CASE NO. 94-191

STATE OF FLORIDA,

Appellee.

Decision filed March 14, 1995

Appeal from the Circuit Court
for Brevard County,
John A. Rudd, Senior Judge.

John W. Tanner, P.A., and
Judy Taylor Rush, of
Tanner & Wilson
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Kellie A. Nielan,
Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM

AFFIRMED.

HARRIS, C.J., DAUKSCH and PETERSON, JJ., concur.

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA FIFTH DISTRICT
JANUARY TERM 1995

DANIEL MURPHY DUPUY, et al.

Appellants,

v. CASE NO. 94-192

STATE OF FLORIDA,

Appellee.

Decision filed February 28, 1995

Appeal from the Circuit Court
for Brevard County,
John A. Rudd, Senior Judge.

John W. Tanner, P.A., and
Judy Taylor Rush, of
Tanner & Wilson
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Kellie A. Nielan,
Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM

AFFIRMED.

HARRIS, C.J., DAUKSCH and PETERSON, JJ., concur.

APPENDIX D

STATE OF FLORIDA,

vs.

JOSEPH MICHAEL ALF, CHERRY LYNN ANDERSEN, DAVID KENT ANDERSEN, MILTON FRANKLIN ARTHUR, GAIL LANDIS BRIGHTBILL, VALERIE CADEL, ANN A. COOPER, RICHARD JOSEPH DEAN, THOMAS PATRICK EDENS, MARK STEVEN HALL, JEFFREY THEODORE HARRIS, JOHN ANTHONY KELLEY, JAMES F. KIERNAN, PETER KNUDSON, ROBERT KOPITZKE, THOMAS EDWARD KRYSTM LUTHER VINCENT LAITE, DOROTHY PHYLIS LEEDS, CHARLES JOHN LINDERBERGER, DON LORD, JAMES E. MAHER, PATRICIA MCEWEN, THOMAS FRANCIS MCGLADE, PATRICIA MORRIS, NORMA P. MUNROE, GERALD MARTIN NICHOLS, ERIN DANIEL OLSON, RORY MICHAEL PASTORIUS, JOEL PATRICK PINKSTON, MEREDITH TROTTER RANEY, BRIJET ALSBERG, SALLY SALBERG, LESLIE LEON SHROCK, DONALD LEE SNIFF, MARY SUTPHIN, CHERYL UNTERBERGER, CHARLES UNTERBERGER, CHAD W. ZODY,

Defendants

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
FOR BREVARD COUNTY, FLORIDA

CASE NO. 93-6068, et al.

JUDGMENT FINDING CONTEMPT
ADJUDICATION OF GUILT, AND IMPOSING
SANCTIONS

THIS CAUSE came before the court on July 12-13, 1993, at the consolidated trial of all of the above-named defendants on the charge of Indirect Criminal Contempt. Michelle Jackson, Esq., appeared by order of the court on behalf of the State of Florida and George T. Paulk, Esq., appeared on behalf of each Defendant. Based upon the evidence presented, the arguments of counsel, and being fully advised in the premises, the court makes the following findings:

(1) All of the above-listed Defendants are present.

(2) The evidence establishes that the Defendants had notice of the Injunction, that they had the intent to violate the Injunction by entering the "buffer zone", and that they acted in concert or participated with a named party to the injunction.

(3) Having fully and carefully considered and weighed the totality of the facts and circumstances of these cases, the Court is convinced beyond a reasonable doubt of the guilt of those Defendants whose names were just called and who are now before the Court.

NOW THEREFORE, the Court hereby adjudges each of the above-named Defendants guilty of Indirect Criminal Contempt.

The Court, having fully considered the arguments of counsel with regard to sentencing, and having heard from some of the Defendants in mitigation, passes the following sentences on these Defendants:

(1) ALL DEFENDANTS: It is the judgment of this Court and the Sentence of the Law that you are placed on unsupervised probation for a period of six (6) months with the following conditions: payment to the Melbourne Police Department costs in the amount of $206.15 or an amount to be adjusted after further negotiations between counsel or at a later hearing; payment to the Brevard County Sheriff's Office costs in an amount between $43.00 to $76.00, or likewise to be established at a later time; payment of court costs of $108.00; payment of a monetary fine of $200.00 to be paid in full during the period of probation; further, you will not violate this injunction or any other criminal laws.

DONE AND ORDERED in Titusville, Florida, this 24th day of November, 1993, nunc pro tunc to July 13, 1993.

s/ John A. Rudd
JOHN A. RUDD
Senior Circuit Judge

APPENDIX E

STATE OF FLORIDA,

vs.

SHIRLEY A. ALSPAUGH, ANITA LORENZONI CARROLL, JAMES BOWLER CARROLL, JOSEPH PATRICK CARROLL, ROBERT CHAPMAN, MICHELLE CRAMER, GORDON L. DEANS, SHIELA RAE ESCHENBERG, REBECCA HAWKINS, KATHLEEN HERBERT, BONNI JO JEFFRIES, ARLEAN B. KELLEY, BRUCE ADRIAN LABADIE, WILLIAM LESTOURGEON, DONALD R. LONG, JAMES R. MACLEAN, PATRICK MCDANIEL, JAMIE PATRICK MURPHY, JAMES RUSSELL MYERS, ERIC DANIEL OLSON, CHERYL PALMER, CARLOS QUINTERO, ARIEL JOAN ROBINSON, JOHN CHRISTOPHER ROGERS, RUDY PETER ROHLKE, LAWRENCE WAYNE SALBERG, GREG P. SEGALLIS, WILLIAM B. STRITTMATTER, NANCY STRUNA, TERRENCE T. STRUNA, PHILLIP ALAN SUTPHIN, KEITH TUCCI, JAMES HENRY TULLEY, M. PATRICIA VANDERBILT, RICHARD VANDERBILT RACHEL LORRENCE VELIE, JAMES A. VOOR, ARTHUR PRIDE WIMER,

Defendants.

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
FOR BREVARD COUNTY, FLORIDA

CASE NO. 93-5625, et al.

JUDGMENT FINDING CONTEMPT
ADJUDICATION OF GUILT, AND IMPOSING
SANCTIONS

THIS CAUSE came before the court on July 12-13, 1993, at the consolidated trial of all of the above-named defendants on the charge of Indirect Criminal Contempt. Michelle Jackson, Esq., appeared by order of the court on behalf of the State of Florida and George T. Paulk, Esq., appeared on behalf of each Defendant. Based upon the evidence presented, the arguments of counsel, and being fully advised in the premises, the court makes the following findings:

(1) All of the above-listed Defendants are present.

(2) The relevant question is whether, after reviewing all evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

(3) The element of intent is crucial. In cases like this one where the contempt charge is a violation of an

unambiguous specific court order, the intent inquiry focuses upon whether the Defendants intended to do an act which clearly constituted contempt. If so, the requisite intent may be inferred from the mere doing of the act. Further, a person's right to free speech does not immunize him or her from liability for engaging in proscribed conduct.

(4) A person who is not a party to a proceeding may be held in contempt if he or she has actual knowledge of a Court order and either abets the Defendant or is legally identified with him or her. However, in this case the Court also finds that these Defendants were acting in concert or participating with a named party in the Injunction.

(5) Having fully and carefully considered and weighed the facts and circumstances of these cases, the Court is convinced beyond a reasonable doubt of the guilt of those Defendants whose names were just called and who are now in the courtroom before the Court.

NOW THEREFORE, the Court hereby adjudges each of the above-named Defendants guilty of Indirect Criminal Contempt.

The Court, having fully considered the arguments of counsel with regard to sentencing, and having heard from some of the Defendants in mitigation, passes the following sentences on these Defendants:

(1) KEITH TUCCI: This Court have found you guilty of Indirect Criminal Contempt, it is the

judgment of the Court and the sentence of the law that you be committed to the Brevard County Jail for a period of six (6) months. After thirty (30) days of this sentence, the remaining five (5) months will be stayed and you will be on probation for those five (5) months. The conditions of probation during that five-month period will be that you pay to the City of Milbourne costs in the amount of $138.58, plus costs to the Brevard County Sheriff's Office. The exact amount of the costs to the Melbourne Police Department and the Brevard County Sheriff's Office will be arrived at either by agreement of the respective counsel or at a later hearing. In addition, you will pay Court costs of $108.00 and further, you will not violate this Injunction or any other criminal law or Order of the Court.

(2) ALL OTHER DEFENDANTS: It is the judgment of this Court and the Sentence of the Law that you are placed on supervised probation for a period of six (6) months with the following conditions: payment to the Melbourne Police Department costs in the amount of $138.58 or an amount to be adjusted after further negotiations between counsel or at a later hearing; payment to the Brevard County Sheriff's Office costs in an amount likewise to be established at a later time; payment of court costs of $108.00; payment of a monetary fine of $100.00 to be paid in full during the period of probation; further, you will not violate this injunction or any other criminal law.

DONE AND ORDERED in Titusville, Florida, this 24th day of November, 1993, nunc pro tunc to July 9, 1993.

s/ John A. Rudd
JOHN A. RUDD
Senior Circuit Judge

APPENDIX F

STATE OF FLORIDA,

vs.

DANIEL MURPHY DUPUY, DOLLY EDWARDS, TEKI COLETTE HAWKINS, ALLAN RAY MUNROE, MARJORIE QUINTERO, BETTY JEAN ROSE, JANET R. VOOR, ELAINE RAE OLSON, CHERYL UNTERBURGER, TERRY WARREN CHAPMAN, CHRISTINE BROWN JAGOS, MARY BARKER LESTOURGEON, ROBIN L. LONG, PATRICIA MCEWEN, ANDREA DAWN SELPH, JOYCE PARENTEAU WADE, WENDY RUTH WRIGHT, KATHERINE ANDREWS KOZLOWSKI, KEITH ALAN BRIGHTBILL, HELEN MARGARET HUNTOON, EDWARD F. LINES, LINDA KARIN MCGLADE, GERTRAUD BLAKE MCGREDE, ERIC DANIEL OLSON, THOMAS ELLIS PLUNKETT, MEREDITY TROTTER RANEY, PATRICIA GORE RODGERS, DEBORA LYNN SCHMIDT, LISA DIANE SHROCK, RAYMOND CHARLES UNTERBURGER, MEREDITH TROTTER RANEY, RAYMOND CHARLES UNTERBURGER,

Defendants.

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
FOR BREVARD COUNTY, FLORIDA

CASE NO. 93-6634, et al.

JUDGMENT FINDING CONTEMPT
ADJUDICATION OF GUILT, AND IMPOSING
SANCTIONS

THIS CAUSE came before the court on July 13-15, 1993, at the consolidated trial of all of the above-named defendants on the charge of Indirect Criminal Contempt. Michelle Jackson, Esq., appeared by order of the court on behalf of the State of Florida and George T. Paulk, Esq., appeared on behalf of each Defendant. Based upon the evidence presented, the arguments of counsel, and being fully advised in the premises, the court makes the following findings:

(1) All of the above-listed Defendants are present except for Elaine Olsen (No. 93-06729) and Robin Long (No. 93-07220), who requested the Court to sentence them in absentia due to illness.

(2) The evidence establishes that the Defendants had notice of the Injunction, that they had the intent to violate the Injunction by entering the "buffer zone," and that they acted in concert or participated with a named party to the Injunction.

(3) Having fully and carefully considered and weighed the facts and circumstances of these cases, the

Court is convinced beyond a reasonable doubt of the guilt of the above named Defendants.

NOW THEREFORE, the Court hereby adjudges each of the above-named Defendants guilty of Indirect Criminal Contempt.

The Court, having fully considered the arguments of counsel with regard to sentencing, and having heard from some of the Defendants in mitigation, passes the following sentences on these Defendants:

(1) PATRICIA McEWAN (93-7183, WENDY WRIGHT (93-7218), ERIC OLSEN (93-7923), MERIDETH RANEY (93-7929 AND 93-8909) ray Unterburger (93-7925 and 93-8920): This Court have found you guilty of Indirect Criminal Contempt, it is the judgment of the Court and the sentence of the law that you be committed to the Brevard County Jail for a period of six (6) months. After the service of thirty (30) days of this sentence, the remaining five (5) months will be stayed and you will be on supervised probation for those five (5) months. The conditions of probation during that five-month period will be that you pay a pro-rata share of the costs to the Melbourne Police Department and the Brevard County Sheriff's Office. The exact amount of the costs to the Melbourne Police Department and the Brevard County Sheriff's Office will be arrived at either by agreement of the respective counsel or at a later hearing. In addition, you will pay Court costs of $108.00 and further, you will not violate this Injunction or any other criminal law or Order of the Court. Further, you will each pay a fine of $200.00.

As to Mr. Raney and Mr. Unterburger, the sentence applies to each case against you separately with the jail time running concurrently but the probation time running consecutively.

(2) ALLAN MUNROE (93-6545), CHRISTINE JAGOS (93-7177), LINDA McGLADE (93-7931), THOMAS PLUNKETT (93-7924), LISA SHROCK (93-7932): This Court have found you guilty of Indirect Criminal Contempt, it is the judgment of this Court and the Sentence of the Law that you be committed to the Brevard County Jail for a period of six (6) months. However, the Court stays the imposition of this sentence and places you on supervised probation for a period of six (6) months. The conditions of probation will be that you pay a pro-rata share of the costs to the Melbourne Police Department and the Brevard County Sheriff's Office. The exact amount of the costs to the Melbourne Police Department and the Brevard County Sheriff's Office will be arrived at either by agreement of the respective counsel or at a later hearing. In addition, you will pay Court costs of $108.00 and further, you will not violate this Injunction or any other criminal law or Order of the Court. Further, you will each pay a fine of $100.00.

(3) ALL OTHER DEFENDANTS: It is the judgment of this Court and the Sentence of the Law that you are placed on unsupervised probation for a period of six (6) months with the following conditions: payment to the Melbourne Police Department and the Brevard County Sheriff's Office a pro rata share of costs; payment of court costs of $108.00; payment of a

monetary fine of $200.00 to be paid in full during the period of probation; except that the fine is suspended for Elaine Olsen and Robin Long; further, you will not violate this Injunction or any other criminal law.

DONE AND ORDERED in Titusville, Florida, this 24th day of November, 1993, nunc pro tunc to July 15, 1993.

s/ John A. Rudd
JOHN A. RUDD
Senior Circuit Judge

APPENDIX G – Excerpts From Oral Argument of Madsen v. Women's Health Center

IN THE SUPREME COURT OF THE UNITED STATES

———————————X

JUDY MADSEN, ET AL., :

Petitioner : No. 93 980

v. :

WOMEN'S HEALTH CENTER, INC. ET AL. :

———————————X

Washington, D.C.
Thursday, April 28, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

MATTHEW D. STAVER, ESQ., Orlando, Florida; on behalf of the Petitioners.

TALBOT D'ALEMBERTE, ESQ., Tallahassee, Florida; on behalf of the Respondents.

DREWS S. DAYS, III, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on

behalf of the United States, as amicus curiae, supporting the Respondents.

* * *

(Page 43: Line 1)

MR. D'ALEMBERTE: In the 36 foot zone, because they had used that zone, the court found, to block access, and those findings were –

QUESTION: And you consider that content neutral, just as a – it's – an injunction against a labor union is content-neutral because it also prevents the labor union from saying, don't join the union, right, so it's not –

(Laughter.)

MR. D'ALEMBERTE: It's simply, they're not allowed in the area, Your Honor, and the reason they're not allowed in the area, because they've vowed their purpose to close down the clinic, and they took activity to do it.

QUESTION: With respect, Mr. D'Alemberte, de facto, any injunction against a labor union or against his group is content-directed, de facto it is. You may say in theory the union can come out for the employer, but that's not –

MR. D'ALEMBERTE: But Your Honor – Your Honor –

QUESTION: – what it's all about, You know

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– what kind of speech you're stopping

MR. D'ALEMBERTE: Except, Your Honor, there's a difference here. The difference here is that these rescue organizations do not represent all of the prolife movement. They represent a small fraction of it, and they represent a fraction of it that's dedicated to shutting down the clinics, and one that avowedly says they will violate the law to do it.

Now, if someone shows up who is not associated with them, but is a prolife speaker, they're not subjected to the injunction, and so it's not their speech, but it's their conduct –

QUESTION: Well, they take their chance –

MR. D'ALEMBERTE: – and it's conduct which they said –

QUESTION: They take their chance at being considered in concert. I mean, if you walk up – you know, a policeman say, he looks to me like he's in – have ever heard of chilling effect?

MR. D'ALEMBERTE: Your Honor, I concede that there's a possibility of some chilling effect. You have to make the judgments.

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